CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court – I

Appeal No. E/2824/2011

(Arising out of Order-in-Original No. 16/2011-CE-HYD-III ADJN. Commr. dated 29.07.2011 passed by Commissioner of Central Excise, Customs & Service Tax, Hyderabad-III)

Commissioner of Customs, Central Excise & Service Tax, Hyderabad - III .....**Appellant(s)**

Vs.

M/s Select Foam Products .....**Respondent(s)**

Appearance
Shri Bhanu Kiran, Assistant Commissioner (AR) for the Revenue.
Shri R. Muralidhar, Advocate for the Assessee.

Coram:
Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)
Hon'ble Mr. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 21/02/2019
Date of Decision: 26/03/2019

FINAL ORDER No. A/30420/2019

[Order per: P. Venkata Subba Rao]

This appeal is filed against Order-in-Original No. 16/2011-CE-HYD-III ADJN. Commr. dated 29.07.2011. The respondent herein is engaged in manufacture of Polyurethane Foam. Polyurethane products are manufactured by reacting two chemicals Polyol & Isocyanide. As a result of this reaction polyurethane bun is produced and this is cut into the required sizes and shapes. Another way of manufacture is to inject these two chemicals directly into moulds so that the foam gets formed in the shape of the desired article. The appellant herein is manufacturing polyurethane foam in the form of seat cushions by injecting these two chemicals into appropriate moulds. These moulds meet the requirements of the customer and they take the shape of a seat. The polyurethane foam so produced by the appellant gets used in the seats of the cars/buses or chairs etc. The foam is in the shape and size of the seat and the outer cover has to be added and it has to be fixed to the frame to complete the seat. The appellant classified these cushions meant for seats, as seats under chapter heading 9401 of the Central Excise Tariff.

2. It is the case of the Revenue that since the appellant is not manufacturing seats but are only manufacturing articles of polyurethane foam which cannot be used as seats unless they are fixed to the frame of the chairs/buses/car seats, and upholstered, their products are classifiable as articles of foam under chapter heading 39263010. The consequence of such reclassification is that the appellant will not be eligible to avail the benefit of SSI exemption available to manufacturers under Notification No. 08/2003 and differential duty has to be paid. This notification exempts goods manufactured by any assessee up to rupees one hundred lakhs in a financial year if the goods do not fall under the exclusion list in the Annexure to the notification. Sl. No. (viii) of the Annexure reads "strips of plastic intended for weaving of fabrics or sacks, **polyurethane foam and articles of polyurethane foam, falling under Chapter 39** of the First Schedule". Thus, if the goods manufactured by the respondent are treated as articles of

polyurethane foam under chapter 39 the appellant will not be eligible to the benefit of exemption notification. On the other hand, if the goods manufactured by the appellant are treated as seats under chapter 94 they will be eligible for the benefit of notification. After investigating the respondent, their goods were seized and a show cause notice dated 25.11.2010 was issued by the Department demanding differential duty under Section 11A along with interest under Section 11AB. It was also proposed to confiscate the seized goods under Rule 25 of the Central Excise Rules, 2002 and impose a penalty under Rule 25 read with Section 11AC. For the subsequent period, the show cause notice dated 02.05.2011 was issued to the appellant demanding differential duty and proposing to imposing penalty under Rule 26 of Central Excise Rules.

3. Both these show cause notices were decided by the impugned order by the Adjudicating Authority who held that the goods in question are classifiable as seats under chapter heading 9401 and not as articles of polyurethane foam under chapter 39263010 of the Central Excise Tariff Act, 1985. He held that 9401 is a more specific description than the description under 39263010 and that the goods in question cannot be used as anything other than seats and therefore they are classifiable under 9401. Accordingly, they are entitled to the Notification No. 08/2003-CE. Concluding so, he has dropped the demands in both show cause notices.

4. The Department's appeal is on the ground that the goods in question cannot be called as seats and that are just polyurethane

foam products molded in pre-determined shape. In CBEC Circular No. 10/89, dated 10.02.1989, it was clarified that polyurethane foam products obtained in the form of blocks of regular geometric shape, whether or not printed or otherwise surface-worked, uncut or cut into rectangles but not further worked would merit classification under heading No. 39.21 as articles of polyurethane foam. They would rely on the judgment of the principle Bench of the Tribunal in the case of *Sheela Foam P Ltd.,* [2003 (158) ELT 154] and *Kavitha PU Foam Indus* [2004 (171) ELT 347] in which, it was held that Polyurethane foam articles which are cleared without any further work, are to classified under chapter 39 and not under chapter 94.

5. Learned Departmental Representative draws the attention of the order of the Bench of the Tribunal in the case of *Kurlon Ltd.,* [2014 (308) ELT 155] in which, it was held that regular form of polyurethane foam deserved to be classified under chapter 39 and charged to duty accordingly. In the case of *Vachan Foams* as reported in [2017 (345) ELT 115 (Tri- Kolkata)] also it was held that polyurethane foam in shape is held classifiable under chapter heading 39. Therefore, the Learned Commissioner has erred in classifying the goods under chapter 94 holding it to be more specific heading. The impugned order therefore needs to be set aside.

6. Learned Counsel for the respondent does not dispute the facts of the case but seeks to rely on the order of the Tribunal in the case of *U foam (P) Ltd.,* as reported at [1999 (105) ELT 232 (Tribunal)] in which held that cushion manufactured as seats should be

classified under chapter 94.01. He also relies on the judgment of the Hon'ble Supreme Court in the case of *CCE, Kanpur Vs. Matador Foam* [2005 (179) ELT 257 (S.C.)] in which, vulcanized rubber, cut into the shape of seats of motor vehicles and two wheelers may be classified under chapter heading 94.01. He would further argued 94.01 being a (20) 30 which is a more specific entry.

7. We have considered the arguments on both sides and perused the records. The question to be answered is whether the polyurethane products manufactured by the appellant are classifiable under 9401 as seats or under chapter heading 39263010 as 'fittings for furniture, coach work or the like of polyurethane'. It is not in dispute that these articles are molded in the shape of the seats and sold as cushions. Cushions are not complete seats but need to be fixed to the frame and upholstered to make seats. According to the Revenue these are polyurethane fittings for furniture, coach work or the like and not seats and according to the assessee these are seats by themselves. According to the appellant, cushions are incomplete seats and should be considered as seats. Respondent relies on the judgment of the Hon'ble Apex Court in the case of *Matador Foam* (supra) in which, vulcanized rubber cut to shape of seats of motor vehicles or two wheelers were held classifiable under chapter 90 as they were excluded from purview of chapter 40. It was held that between the tariff headings 94.01 & 40.08 tariff item heading 94.01 being a more specific heading applies. The Department on the other hand relies on the order of the Tribunal in the case of *Kurlon Limited* [2014 (308) ELT 155 (Tri.-Delhi)] in which, it was held that

polyurethane cut into shapes is classifiable under chapter heading 39 with consequential benefits to the assessee. Similarly, in the case of *Vachan Foams forms* [2017 (345) ELT 115 (Tri. –Kol.)] the Tribunal held that the polyurethane foam of regular shapes need to be classified under chapter 39 with consequential benefits.

8. The issue to be decided is whether the polyurethane foam produced in the form of seat and sold by the respondent is classifiable under CETH 9401 or CETH 3926 3010. These two entries are as follows:

9401 seats (other than those of heading 9402) whether or not convertible into beds and parts thereof.

39263010

3926 - other articles of plastics and articles of materials of heading 3901 to 3914

392630 - Fittings for furniture, coach work or the like.

39263010 - of polyurethane foam.

The Adjudicating Authority held that 9401 is the correct tariff heading on two grounds:

a) 9401 is a more specific heading than 39263010.
b) The Tribunal in the case of *U-Foam Industries Ltd.,* [1999 (105) ELT 232 (Tri.)] and *Maruthi Udyog Ltd.,* [1998 (101) ELT 675 (Tri.)] held that such products fall under 9401.

We find in neither of these two cases, the question of classification between 9401 and 3926 3010 of the products was in dispute. In the case of U-Foam, the competing entries examined were 9401 and 9404.

The case of Maruthi Udyog Ltd., answered five questions but classification of polyurethane foam articles between 9401 and 39263010 is not one of them. The case of Sheela Foam Pvt. Ltd., (supra) relied upon by the respondent examined the classification of PU foam cut to the size of mattresses. In the case of Matador Foam, Hon'ble Apex Court examined which was a more specific entry between 40.08 [plates, blocks, sheets, striker, rods and profile shapes of vulcanized rubber other than hardened rubber] and 9401 [seats whether or not convertible into beds and parts thereof] and held that 9401 was a more specific entry.

In the case of Kurlon Ltd., (supra) relied upon by the department, the issue was whether an intermediate product emerged during the manufacture and if so whether it is eligible for exemption. Even in the case of Vachan Foams, the issue of classification between the 9401 and 3926 was not discussed.

9. We find that the issue is not squarely covered by the decisions and examine this case on merits. It is not in dispute that the articles in question are made of polyurethane and nothing else but they can be used only for seats. It is also not in dispute that they are not seats by themselves but become seats when attached to the frame and covered with upholstery. Chapter note 1(d) of chapter 94 excludes articles falling under chapter 39 from this chapter. Similarly, chapter note 2(x) of chapter 39 excludes articles falling under chapter 94. Thus, the chapter notes mutually excluding each other do not help in determining the classification. Therefore, Rule 3(a) of the general rules of interpretation must be applied to which is a more specific

entry. Ld. Adjudicating Authority felt that 9401 was a more specific entry. We find that this heading deals with seats. The article in question is a polyurethane article made specifically for fitting on furniture or coach seats, etc., and is not a seat in itself. This, in our view is a more specific description of the goods in question than a seat. Therefore, we hold that the goods in question are correctly classifiable under 3926 3010.

10. Accordingly, on merits, we hold the classification in favour of the revenue. However, this being a classification issue, we find that the assessee may have entertained a genuine belief that their goods were classifiable under 9401. Therefore, no allegation of fraud, misstatement or suppression of facts can be attributed to them. Confiscation of the goods and imposition of penalties are also not justified in this case. Accordingly, we pass the following order.

11. We allow the appeal of the Revenue partly holding the goods are classifiable under 3926 3010 and differential duty and interest, if any, only within the normal period is upheld. The proposals for confiscation and imposition of penalties are set aside.

(Order pronounced in open court on 26/03/2019)

P. VENKATA SUBBA RAO
MEMBER (TECHNICAL)

M.V. RAVINDRAN
MEMBER (JUDICIAL)

Lakshmi….